Supreme Court, U.S.
FILED

94 393 SEP - 1 1994

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No. ____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

M. F. GUETERSLOH, JR.,

Petitioner

V.

THE STATE OF TEXAS; THE PUBLIC UTILITY COMMISSION; PAUL MEEK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION; THE TEXAS WATER COMMISSION; JOHN HALL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS WATER COMMISSION; DAN MORALES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF TEXAS; NORMA K. SCOGIN AND KAREN PETTIGREW, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS ASSISTANT ATTORNEYS GENERAL OF TEXAS; AND JAMES MILLER,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is the Eleventh Amendment a procedural bar to a takings claim under the Fifth and Fourteenth Amendment to the U. S. Constitution, in an inverse condemnation suit against a State and its officials?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

M. F. GUETERSLOH, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 3, 1994.

OPINIONS BELOW

The June 3, 1994 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unpublished, and is reprinted in the separate Appendix to this Petition. The prior opinion of the United States District Court for the Western District of Texas, Austin Division, entered September 17, 1993, is unpublished, and is reprinted in the separate Appendix to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1994. The

jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eleventh Amendment bars suits against a state that seek to impose a liability which must be paid from public funds. The question presented in this case is whether it is also a procedural bar for deprivation of property without just compensation under the Fifth Amendment as applied to the states through the Fourteenth Amendment. The specific question addressed to this Court is whether the Eleventh Amendment can bar actions against a State for a State's taking of its citizen's property when the Fifth and the Fourteenth Amendments to the U. S. Constitution mandate that the State pay for such takings.

STATEMENT OF THE CASE

This is an inverse condemnation claim brought pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. In a prior state-court

proceeding, petitioner, as plaintiff, sued the State of Texas and various of its agencies and representatives, for payment of just compensation pursuant to the requirements of Article 1, Section 17 of the Texas Constitution.

The State of Texas, through various of its agencies, placed a private water system, which was the security for petitioner's purchase money deed of trust note, in receivership for a period of over five years. During the receivership, the State of Texas paid nothing of petitioner's note. After petitioner sued for foreclosure and regained title to the water system, the State of Texas refused to relinquish possession of the water system to him. The State of Texas, through its agencies, retained the system in receivership to provide water to citizens of a subdivision of Lubbock County, Texas, until the City of Lubbock could complete its water system to service that area. Only after the City of Lubbock

completed its system, did the State of Texas, through its agencies, return possession of the water system to petitioner. At that time, however, the system was worthless as all former customers had become customers of the City of Lubbock. Throughout the period of the receivership, a period of over five years, nothing was paid to petitioner for the use of his system.

Despite having physically occupied petitioner's property and totally destroying the underlying value of a validly perfected security interest in the system, the State asserted that petitioner was due nothing for the state's prolonged, exclusive, and uncompensated use of his privately owned water system. When petitioner sought compensation in an inverse condemnation suit filed in the state district court in Texas, the state district court granted the state's motion for summary judgment. The decision of the state trial court was affirmed by the

state court of appeals; the Texas Supreme Court subsequently denied petitioner's application for a writ of error.

Petitioner did not assert a claim under the Fifth Amendment because, as this Court has held, claims for "just compensation" premised under the Fifth and Fourteenth Amendments of the United States Constitution are not ripe for review until a property owner has unsuccessfully sought compensation from the State. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985). Under federal law, takings claims are supplemental to state proceedings, and are therefore premature until state compensation procedures have been unsuccessfully pursued. See also MacDonald, Sommer, and Frates v. Yolo Co., 477 U.S. 340, 349 (1986).

Within three months after finally, but unsuccessfully, exhausting his state compensation remedies, petitioner filed the present action in the U. S. District

Court for the Western District of Texas. In that action he asserted that the state's failure to pay him just compensation for its taking of his property and the state courts' refusal to hear his claim violated his federal constitutional right to just compensation.

THE RULINGS BELOW

After hearing, the U.S. District Court for the Western District ruled that the petitioner take nothing. The District Court found that despite uncontroverted evidence of physical appropriation by the State, no "taking" occurred, the property at issue had no value, and the claim was barred by the Eleventh Amendment, the statute of limitations, and the doctrine of res judicata. Civil rights violations asserted against various state officials were similarly dismissed.

Petitioner appealed the decision of the U.S. District Court to the Court of Appeals for the Fifth Circuit. The Court of Appeals modified the judgment of the

U.S. District Court, ruling that the suit should have been dismissed for want of jurisdiction under the Eleventh Amendment. As modified, the judgment of the U.S. District Court was affirmed.

Petitioner applies for writ of certiorari praying that this Court will review the judgment of the Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has ruled, in an unpublished opinion, that the Eleventh Amendment is a bar to a citizen's takings claim against a State under the Fifth and Fourteenth Amendments to the U.S. Constitution. The Sixth Circuit, on the other hand, ruled, in 1982 in Wilson v. Tennessee, also in an unpublished opinion, that the Eleventh Amendment is not a bar to an action for deprivation of property without just compensation under the Fifth Amendment and Fourteenth Amendments. Thus, the circuits, albeit in unpublished opinions, are in conflict over the

question of whether the Eleventh Amendment effectively insulates a state from the just compensation requirement of the Fifth Amendment.

This petition invites this Court to revisit the just compensation requirement of the Fifth Amendment to determine whether property owners who suffer uncompensated, categorical state takings, are ever actually entitled to litigate those federal constitutional claims. Given the unique interplay between federal and state just compensation requirements, property owners who suffer such takings must first utilize available state remedies before their Fifth Amendment claim is available for review. Given the present holding of the Fifth Circuit, once that claim is "ripe" for review, it may also be precluded because of the Eleventh Amendment.

The decision of the Fifth Circuit in this case has the effect of rendering the takings clause of the Fifth Amendment

meaningless as applied to the states because, according to the Fifth Circuit, a citizen is jurisdictionally barred from bringing a Fifth
Amendment takings claim against a state in a federal court. This is a most important question of federal law which has not been, but should be, settled by this Court. As Respondent, the State of Texas, has agreed (in a letter to the Court of Appeals of the Fifth Circuit asking that the opinion be published), the opinion concerns and discusses legal issues of significant public interest.

A right without a remedy is no right at all. Where the state itself effects a taking, the "unique nature" of the property clause, when combined with notions of sovereign immunity implied from the Eleventh Amendment, effectively reduces the constitutional promise of just compensation to a mere tautology.

Petitioner contends that the opinion of the Fifth Circuit is in direct conflict

with this Court's opinion in First English Evan. Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) in which this Court stated that government action that works a taking of property rights "necessarily implicates the constitutional obligation to pay just compensation." In footnote 9 of that opinion, this Court addressed the contention of the Solicitor General that the Fifth Amendment, "combined with principles of sovereign immunity," is only a limitation on the power of the government to act, not a remedial provision. This Court refuted the argument of the Solicitor General that "the Constitution does not of its own force, furnish a basis for a court to avoid damages against the government." This Court restated its position that in "various jurisdictional settings," it is "clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking."

This Court has ruled in First English Evan. Lutheran Church, 482 U.S. at 315, that "...a landowner is entitled to bring an action against the state in inverse condemnation as a result of 'the self-executing character of the constitutional provisions with respect to compensation..." This Court noted in First English that claims for just compensation "are grounded in the Constitution itself." This Court early ruled, in U.S. v. Causby, 328 U.S. 256, 267 (1946), that when there is a taking, the claim is "founded upon the Constitution and within the jurisdiction of a federal court to hear and determine." The Court of Appeals for the Fifth Circuit, on the other hand, has ruled that a state's sovereign immunity is a constitutional limitation of the jurisdiction of a federal court to "hear and determine" a takings claim against a State.

Because, as this Court stated in First English, petitioner's suit is "founded upon the Constitution of the United States," the Eleventh Amendment should not be, and indeed cannot be, a procedural bar to his suit for just compensation.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although this language expressly encompasses only suits brought against a State by citizens of another State, this Court ruled in Hans v. Louisiana, 134 U.S. 1, (1890) that the Amendment bars suits against a State by its own citizens as well. Thus, but for stare decisis, the Eleventh Amendment clearly would have no application to petitioner's suit against the State of Texas for its taking of his property.

The Fifth Amendment provides that private property may not be taken "for public use, without just compensation." The Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

The Fifth Amendment, which requires the government to pay just compensation for a taking of private property for public use, is made applicable to the states through the Fourteenth Amendment. [See Chicago, B, & Q.R.R. v. Chicago, 166 U.S. 226 (1897), First English Luth. Church, cited above]. The Fifth Amendment's just compensation provision is designed to bar the government from foisting a disproportionate burden upon a particular group of individuals for a harm which is public and whose burden should be shared by the public as a whole. Pennel v. City of San Jose, 485 U.S. 1, 9 (1988).

As the Supreme Court stated in First English Luth. Church, 482 U.S. at 315,, government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay compensation."

The concept of "just compensation" contemplates the fair treatment of individuals whose rights in property must, at times, be subordinated to the needs of society as a whole. In Armstrong v. United States, 364 U.S. 40, 49 (1960), the Supreme Court stated:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole.

In Lucas v. South Carolina Coastal Council, 120 L.Ed.2d 798 (1992), this Court ruled that a legislature could not deprive a property owner of the only economically valuable use of his land,

even if the legislature found it to be a harmful use. 120 L.Ed. 2d at 819. This Court stated: "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." Id at 812. This Court confirmed that it had stated "on numerous occasions" that "the Fifth Amendment is violated when land-use regulation...denies an owner economically viable use of his land." Id. at 813.

This Court, in First English Evan. Luth. Ch. v. Los Angeles Cty, cited supra, recognized that its ruling in English would "undoubtedly lessen to some extent the freedom and flexibility" of governmental agencies. But it stated, "such consequences necessarily flow from any decision upholding a claim of constitutional right." 482 U.S. at 321. It then affirmed that "many of the provisions of the Constitution are designed to limit the flexibility and

freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them." Id. (Emphasis added.)

In Dolan v. City of Tigard, 129 L.Ed.2d 304 (1994), this Court stated:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation...

Still, based on what Justice Brennan characterized as "a number of ad hoc and unmanageable rules bearing little or no relation to one another or to any coherent framework" [Papasan v. Allain, 478 U.S. 265, 292 (1986)], the Court of Appeals for the Fifth Circuit ruled that petitioner cannot bring a suit, grounded on the Fifth and Fourteenth Amendments to the U.S. Constitution, because of the Eleventh Amendment.

The Sixth Circuit is in disagreement with the Fifth Circuit. In Wilson v. Tennessee, unpublished opinion, 1982, the

Sixth Circuit ruled that the "Eleventh Amendment does not bar an action for deprivation of property without just compensation under the Fifth Amendment as applied to the states through the Fourteenth Amendment." In Bentley v. Ellam, 764 F. Supp. 322, 328 (M.D. Pa. 1991), a U.S. District Court in Pennsylvania also ruled that the Eleventh Amendment does not bar a suit against a state when the complaint is predicated on violations of "federal due process, and possibly, fifth amendment rights."

Justice Brennan characterized the "hodgepodge" of law relating to the Eleventh Amendment as having no effect except "to impair or prevent effective enforcement of federal law." He stated:

> It is highly unlikely that, having created a system in which federal law was to be supreme, the Framers of the Constitution or of the Eleventh Amendment nonetheless intended for that law to be unenforceable in the broad class of cases now barred by this Court's precedents.

It is highly unlikely that the framers of the Eleventh Amendment (which, on its face, applies only to suits against a State by citizens of another State or subjects of a foreign State) intended it to apply to a suit against a State by a citizen of that State for just compensation pursuant to the takings clause of the Fifth Amendment.

Justice Brennan referred to what he called the "magnitude of the Court's mistake" in Hans v. Louisiana as the "first step" down an "ill-advised path," for as Justice Brennan pointed out, the "National Government and federal law play a much more important role in protecting the rights of individuals today." 478 U.S. at 292. According to Justice Brennan:

> Only stare decisis can support the Court's continued adherence to this unfortunate doctrine. Stare decisis is indeed a force to be reckoned with--although the Court has not felt itself particularly constrained by stare decisis in expanding the

protective mantle of sovereign immunity.

The Court of Appeals for the Fifth Circuit based its ruling in this case on this Court's decision in Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984). Although a majority of this Court did rule in Pennhurst that the Eleventh Amendment is a jurisdictional bar to a suit for damages in federal court against the state, this Court did not address in Pennhurst the issue of whether a federal court has jurisdiction to hear a citizen's Fifth Amendment takings claim against a state.

Justice Brennan referred to this Court's decision in Pennhurst as an example of this Court expanding the mantle of sovereign immunity. He stated

> The Court's Eleventh Amendment jurisprudence is not supported by history or by sound legal reasoning; it is simply bad law. In matters of such great institutional importance as this, stare decisis must yield.

Stare decisis need not yield for this Court to rule the Eleventh Amendment is not applicable to Fifth Amendment takings claims. This Court has never ruled that the Eleventh Amendment is a bar to a Fifth Amendment takings claim. The Eleventh Amendment was never intended to bar such a suit. To permit a court of appeals to expand further the Eleventh Amendment decisions by letting stand a ruling of a court of appeals that the Eleventh Amendment takes precedence over the Fifth Amendment will have the ultimate effect of writing the Fifth Amendment, as it applies to the states, out of the U.S. Constitution because any federal suit against the State for the State's taking of its citizen's property would be barred by the Eleventh Amendment. The Fifth Circuit attempts to gloss over this inevitable outcome by explaining that an aggrieved citizen can bring a Fifth Amendment claim in state court even though, at that point, the citizen will

have already filed an unsuccessful inverse condemnation suit in state court under the state constitution.

The Fifth Circuit cursorily addressed the problem of a citizen being jurisdictionally incapable of filing a Fifth Amendment claim against a state by explaining in its opinion (Opinion, p. 3):

> [T]he State of Texas through its Attorney General confirms and as Guetersloh admits, the courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas Constitution and laws."

Although the State of Texas does posit that there are "adequate" remedies for the State's taking of its citizen's property in state courts, it is questionable how the Fifth Circuit could conclude that petitioner "admits" to their adequacy. Petitioner already filed one suit in state court for a claim under the Texas Constitution for the state's taking of his

property. The state district court granted the State's motion for summary judgment. The state appellate court affirmed the decision of the district court, and the Texas Supreme Court refused to grant petitioner's application for a writ of error. The Court of Appeals for the Fifth Circuit is suggesting that petitioner must now go anew into the state court system, one that was completely hostile to his takings claim under the Texas Constitution, and begin again to assert his rights, his second litigation to be a takings claim under the Fifth Amendment.

As authority for its position that petitioner has an adequate remedy in the state courts to assert now a taking claim under the Fifth Amendment, the Fifth Circuit cited Estate of Scott v. Victoria County, 778 S.W.2d 585 (Tex. App.--Corpus Christi 1989). In Estate of Scott, the plaintiff brought an inverse condemnation suit against the State of Texas under both

the Fifth Amendment and the Texas Constitution. The Corpus Christi appellate court ruled that there was no taking of the plaintiff's property that would require the State to pay compensation. The Corpus Christi court ruled that all property "is held subject to the valid exercise of the police power and compensation is generally not required for losses resulting therefrom."

In petitioner's inverse condemnation suit filed in state court, the appellate court also ruled, as a matter of law, that the state's taking of his property was "a valid exercise of the police power" and that compensation was not required for the loss petitioner sustained. Petitioner asserts that the rulings of the Texas appellate courts have confirmed that the state remedy is inadequate in actual practice to provide him with just compensation for the state's taking of his property.

Petitioner has exhausted state remedies. He should not be required to file suit again in state court, alleging a claim under the Fifth Amendment, rather than the Texas Constitution, to demonstrate anew that state remedies are not adequate. The claim against the State under the Fifth and Fourteenth Amendments to the U.S. Constitution is a federal claim. The Court of Appeals for the Fifth Circuit should not refuse jurisdiction by contending such a suit could have been brought in state court. The jurisdiction of a federal court is not determined by whether or not a suit "could have been brought" in state court.

In Ex Parte Virginia, 10 S.Ct. 339, 346 (1879), this Court ruled that the prohibitions of the Fourteenth Amendment are directed to the States and that they are restrictions of State power. This Court stated in Ex Parte Virginia that the enforcement of these prohibitions "is no invasion of State sovereignty."

Four justices of the Court dissented in Pennhurst, the decision relied upon by the Fifth Circuit. The dissenting justices, Justices Brennan, Stevens, Marshall and Blackmun, pointed out that the Eleventh Amendment is the product of what they termed a "remarkable misapplication of the ancient doctrine of sovereign immunity." They noted that the Eleventh Amendment, on its face, applies only to suits against a state brought by citizens of other states and foreign nations. The doctrine of sovereign immunity, as noted by the dissenting opinion in Pennhurst, developed in England where it was thought the King could not be sued. But the Fifth Amendment to the U. S. Constitution provided citizens with a right to be paid when their property was taken by the government. The framers of the Constitution surely intended that the King could be sued if the King refused to pay compensation for the taking of its subjects property. Although the changes

in our social fabric favor the limitation, rather than the expansion of sovereign immunity, this Court has not chosen to limit the doctrine. As the dissenting opinion pointed out in Pennhurst, "the concept that a sovereign can do no wrong and that citizens should be remediless in the face of its abuses is more a relic of medieval thought than anything else." In his dissenting opinion, Justice Brennan commented

> Whether this immunity [sovereign immunity] is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the state...It is the doctrine of absolutism, pure, simple, and naked.

Justice Brennan noted that the reason for adding the Eleventh Amendment to the Constitution was federalism. But as he noted, the Civil War "irrevocably and profoundly altered the balance of power between the federal and state

governments." He noted that the Fourteenth Amendment was adopted by the people and added to the Constitution to place a check upon the "arrogance of some of the states."

The "arrogance" of the State of Texas is exemplified in the current case. The State of Texas has absolutely refused to pay petitioner for its taking of his property. It refused him a hearing in its courts. The Court of Appeals for the Fifth Circuit has ruled that he also can have no hearing in the federal courts to address a right constitutionally granted him by the Fifth Amendment to the U.S. Constitution because of this ancient and archaic doctrine that "the State can do no wrong." The State of Texas has committed a wrong. It has blatantly refused to follow the constitutional mandate as set out in the Fifth Amendment. To refuse, because of federalism, to permit petitioner to file a suit against the state to require the state to do what it

is constitutionally mandated to do, is "absolutism, pure, simple, and naked."

When a state refuses to compensate a property owner for the state's taking of such property for a public use, a property owner may sue the state directly under the Fifth and Fourteenth Amendments to the U. S Constitution. [See Bivens v. Six Unknown Federal Narcotics Agents, 403 U. S. 388 (1971).] In Bivens, this Court ruled that, with respect to the Fourth Amendment, "..it is...well settled that where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." 403 U. S. at 395-6. In First English, this Court recognized that landowners are entitled to bring an action in inverse condemnation as a result of "the self-executing character of the constitutional provision with respect to compensation..." 482 U.S. at 315. This Court quoted Jacobs v. United States, 290

U.S. 13 (1933) as establishing that "claims for just compensation are grounded in the Constitution itself.." Id. As this Court stated, the suits were "founded upon the Constitution of the United States." Id. [See also Lucas v. South Carolina Coastal Council, 120 L.Ed.2d at 810, wherein this Court referred to "ripeness" as the only deterrent to a property owner being entitled to the Court's adjudication of his takings claim.] In First English, 482 U.S. at 316, n. 9, this Court refuted the government's argument that the Constitution does not furnish a basis for a court to award money damages against the government. It affirmed that "it is the Constitution itself that dictates the remedy for interference with property rights amounting to a taking."

In Williamson Co. Regional Planning Co. v. Hamilton Bank, 473 U.S. 172 (1985), this Court recognized a property owner's right to sue the state under the Fifth

Amendment for compensation for a state's taking of property for a public use. This Court dismissed the claim but on the basis that the property owner's claim was premature because the owner did not exhaust state remedies. In Hamilton Bank, this Court set out its approach to taking claims. A property owner may sue the state in federal court after the owner has demonstrated that there are no adequate state procedures to satisfy the property owner's claim. (This Court referred to its decision in Hamilton Bank in its most recent takings decision in Lucas v. South Carolina Coastal Councils, 120 L.Ed.2d at 810.)

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), this Court discussed the Eleventh Amendment and the principle of state sovereignty which, the Court recognized, is embodied in the Eleventh Amendment. This Court in Fitzpatrick acknowledged that when Congress enacts legislation enforcing the Fourteenth

Amendment, it may provide citizens with a direct cause of action against the states. As this Court ruled in Fitzpatrick, section five of the Fourteenth Amendment enables Congress to compel state compliance with the Fourteenth Amendment. This Court stated in Fitzpatrick:

> Were it not for the fifth section of the amendment there might be room for argument that the first section is only declaratory of the moral duty of the State. But the Constitution expressly gives authority for congressional interference and compulsion in the cases embraced within the fourteenth amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete. 427 U.S. at 456

Congress has waived Eleventh Amendment immunity with respect to a suit against a state based upon a state's infringing an author's copyright in the author's creation. [See 17 U.S.C. §511. See also 17 U.S.C. §501(a).] Congress has recognized that a state, as a private citizen, should not be permitted to appropriate another's property interest in

the form of a created work. The framers of the U.S. Constitution recognized that a state should not be permitted to appropriate another's property interest by taking private property for a public use without paying the property owner just compensation. As Congress has specifically provided, a suit against the state for damages for infringing a copyright, an intangible property interest, is not barred by the Eleventh Amendment. (See 17 U.S.C. §511.) A suit against the state for refusing to pay compensation to an owner of tangible property for the state's taking of that property should also not be barred by the Eleventh Amendment. The right to just compensation is a right grounded in the Constitution itself based upon the people's concern that tyranny and arrogance on the part of the states should not be tolerated. A court should not write this right out of the Constitution

by a misapplication of the Eleventh Amendment.

The Eleventh Amendment only bars suits against an unconsenting state; therefore, when a state consents to suit in federal court, it waives Eleventh Amendment immunity. [See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).] Although this Court in Atascadero, and more recently in Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990), ruled that a state must express definite language of consent in a statute or a constitutional provisions, the Texas Constitution has in and of itself provided that express consent. Article I, §17 of the Texas Constitution states that no person's "property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being paid.." It further provides that "...no irrevocable or uncontrollable grant of special privileges or immunities, shall be

made." In Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex 1980), the Texas Supreme Court recognized that a cause of action under Article I, §17 of the Texas Constitution was not grounded upon proof of either a tort or a nuisance. The Texas Supreme Court ruled that the Texas Constitution itself was the authorization for compensation for the destruction of property and was a waiver of governmental immunity for the taking, damaging, or destruction of property for public use.

The Texas Constitution specifies that no immunities are available. This Court recognized in footnote 9 in First English that sovereign immunity is not a bar to a taking claim under the Fifth Amendment. The concept of sovereign immunity and federalism as embodied in the Eleventh Amendment should not be available to the State as immunity from a citizen's suit to require the State to pay just compensation for its taking of the citizen's property,

as required by the Fifth and Fourteenth Amendments to the U.S. Constitution.

CONCLUSION

To implicate the federal takings question, a state must not only take someone's property, it must also deny him or her compensation as well. In Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172 (1985), this Court stated that a property owner may sue the state in federal court after the owner has demonstrated that there are no adequate state procedures to satisfy the property owner's claim. Petitioner has demonstrated there are no adequate state procedures to satisfy his claim.

Plaintiff was required to utilize the state court procedures prior to filing a claim under the Fifth and Fourteenth Amendments to the U. S. Constitution. Plaintiff's takings claim under the Fifth and Fourteenth Amendments was predicated upon his having adjudicated his claim in state court and his having been denied

just compensation. His Fifth Amendment takings claim for just compensation became ripe after he exhausted state remedies. The Eleventh Amendment should not, and cannot, effectively eliminate his takings claim by providing a jurisdictional bar to his claim.

For the reasons stated, petitioner prays that this Court review and reverse the judgment of the United States Court of Appeals for the Fifth Circuit and remand the case to the Fifth Circuit for its consideration of petitioner's claim that the U.S. District erred in its ruling on the merits of petitioner's claim.

Respectfully submitted,

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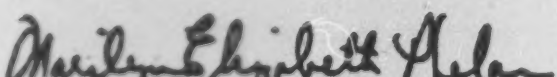

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NO. A-92-CA-359

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

M. F. GUETERSLOH, JR.,

V.

THE STATE OF TEXAS, ET AL.

ORDER

Comes now the Court and enters the following final Order in the above-styled cause of action.

BACKGROUND

The Court makes the following finding of facts:

In 1982, Plaintiff had a lienholder's interest in a privately owned rural water system near Lubbock, Texas. Plaintiff sold the water system to a Mr. Ray Nichols and retained a vendor's lien and deed of trust as security for the purchase price. The Defendant put on evidence that the water system was in poor condition at the time of the sale from Plaintiff to Mr. Nichols. After receiving complaints, the Public Utility Commission ("PUC")

conducted an investigation into Nichols' alleged mismanagement of the system. The PUC entered an Order on October 22, 1982, directing Nichols to take certain steps and advising him that his failure to do so might result in the imposition of a receivership. Time passed, the violations continued, and the PUC obtained an Order from a Texas District Court on July 21, 1983, in The State of Texas v. Ray Nichols, d/b/a Carlisle Water Supply, Cause Number 343,820, in the 250th Judicial District of Travis County (the "receivership suit") naming a receiver to take possession and operate the water service in compliance with appropriate health standards.[1] Defendant Miller, by

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[1]The summary judgment evidence establishes that the receivership lasted about five years, the last three of which occurred during the period of time that the Plaintiff claims to have had ownership of the property. Plaintiff did not intervene in the receivership, although he had the legal right to do so. The Plaintiff has no explanation for his failure to do so beyond his subjective

the same Court Order, was appointed as the Receiver for the utility. Attorneys from the Attorney General's office gave notice to the Plaintiff of various matters that were going on in the receivership proceedings. More time passed, and in 1985 the Plaintiff foreclosed and took legal title of the land. In December, 1985, the Plaintiff attempted to re-enter and take possession of the system, including physically removing one of the pumps from the plant, and the receiver obtained injunctive relief that prevented Plaintiff from having access onto the property. The application to vacate the receivership was filed on February 1, 1988. The Court entered an order vacating

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belief that he would not have been successful. The Plaintiff's failure to intervene resulted in a forfeiture of his right to litigate within that forum his claims of waste and collusion by the City of Lubbock as well as objecting to the final accounting and obtaining judicial review of the district court's oversight of the receiver.

the receivership on March 25, 1988. The Plaintiff now has control of the water system.

Thus the Plaintiff had from 1985 through March, 1988, to intervene in the receivership case and assert any legal rights he had concerning the water supply system. The Plaintiff made a conscious decision not to intervene in the state receivership action. Instead, the Plaintiff filed a suit in the district court of Lubbock County, Texas, against the receiver, Miller, and the City of Lubbock (the "state suit"). In that state case, Plaintiff originally brought claims under both the state and federal constitutions alleging a "taking, damaging, or destroying . . . without adequate compensation." Plaintiff then amended his pleadings to delete the claims under the U.S. Constitution. More time passed, and the state court terminated the receivership--without objection from the Plaintiff-- and the final accounting was

approved on April 5, 1988. The state district court soon thereafter granted the defendants' motion for summary judgment for all parties other than the PUC and transferred the case to Travis County, Texas. The state district court--in the absence of any evidence from the Plaintiff, even evidence of legal title to the water supply system--granted summary judgment for the PUC. The Plaintiff appealed these decisions through all of the state appellate courts, including the Texas Supreme Court. The Texas Supreme Court denied the Plaintiff's writ of error. The Plaintiff has now filed this suit in federal court against a host of Defendants under a number of theories.

PLAINTIFF'S CLAIMS FOR RELIEF

Plaintiff seeks relief under several theories. First, that the State of Texas is liable under the fifth and fourteenth amendments to the United States Constitution for "just compensation" under a theory of "taking" by the state of

Plaintiff's property. The claims against the individual Defendants are less well defined, but amount to liability under 42 U.S.C. § 1983 for their actions relating to the "taking" or the tortious exercise of the state's police power.

DEFENDANTS' RESPONSES

The State disputes that any permanent and compensable "taking" of the Plaintiff's water system ever occurred. To the contrary, the State argues, the PUC placed the Plaintiff's "property", which was a utility, into receivership. This action, the State contends, was not a permanent taking of property. The Defendants argue that the state court receivership suit was the proper forum to determine the Plaintiff's property rights with regard to the water system. Thus the Plaintiff has no cause of action to be compensated as opposed to if the water system had been taken under the concept of eminent domain or inverse condemnation.

The State relies heavily on the twin defenses of res judicata and statute of limitations. The State also asserts the defenses of the Eleventh Amendment and qualified immunity.

1. The 42 U.S.C. § 1983 Claims Against the Texas Attorney General and His Assistants.

The Plaintiff has alleged 42 U.S.C. § 1983 claims against the attorneys who represented the state in the state case. The Court finds this claim to be spurious at best.

The Plaintiff's claims are barred by the qualified immunity that the state's attorneys have in acting within the scope of their employment in representing the state in litigation. The attorneys for the PUC did no more in defending the Plaintiff's claims against the PUC and the other state defendants than what all attorneys are ethically bound to do: zealously represent their client, and win their suits. The state's attorneys raised the defense that Plaintiff's claims should

have been raised in the receivership action. At every level, the state courts ruled in favor of the Defendant. In other words, the Plaintiff seeks to hold liable attorneys that raised defenses that were endorsed by a state district judge, by the state appellate court, and by the state supreme court. The Court finds that the Plaintiff had actual notice of the receivership lawsuit and made a conscious decision not to intervene. After a careful review of Plaintiff's Exhibits P-3 and P-4, this Court rejects Plaintiff's contention that he was prohibited by any state court injunction from intervening in the receivership action. The receivership court was the appropriate forum for the Plaintiff to establish his rights concerning the water system.

Despite the fact that the Plaintiff litigated his claims in the case he filed in state court, he requests this federal Court to collaterally attack the state court litigation under the patina of a

federal civil rights claim. Plaintiff's claim that he was "deprived" of his constitutional right to be heard in the state courts is without merit. Plaintiff had notice of, but chose not to intervene in, the receivership suit. Plaintiff filed and fully litigated an inverse condemnation suit in Lubbock County, Texas. The PUC intervened in this case and had it transferred to Travis County, Texas. The Plaintiff prosecuted this case through the state court system and he lost. The federal courts do not sit to determine whether state courts properly decide legal issues. The Plaintiff has failed to prove that he was deprived of any rights in the state court system. He filed his suit. The Courts considered his claims and the defenses raised by the state. The Plaintiff lost at the trial court level, the appellate court level, and the supreme court level. There is no merit to the Plaintiff's claim that these Defendants deprived him of rights by

raising a "new" defense for the first time on appeal. The decision of whether the state's attorneys raised improper legal arguments was for the state appellate and supreme courts to decide, both of which ruled in favor of the Defendants and the Plaintiff has failed to produce any evidence that the actions of the state courts or the state's attorneys deprived him of any rights.

The Plaintiff has failed to establish by a preponderance of the evidence that the conduct of the defendant attorneys violated any clearly established constitutional or federal statutory rights of the Plaintiff of which an objective, reasonable person would have known. These Defendants therefore enjoy immunity from liability from the claims made by the Plaintiff. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982). The Court finds further that, regardless of the state's attorneys right to immunity,

Plaintiff's claims against the state's attorneys have no merit.

The Plaintiff's claim against Attorney General Morales is without merit given the total lack of any evidence that Defendant Morales had any personal involvement in the lawsuit or that he maintained any policies, practice, or custom that resulted in the loss of the Plaintiff's civil rights. At best, Attorney General Morales is the ultimate supervisor of the other attorneys general named as Defendants. Defendant Morales was not even the Attorney General at the time when most of the salient events occurred. Supervisors are not vicariously liable for § 1983 violations of their subordinates. Monell v. Department of Social Serv., 436 U.S. 658, 98 S.Ct. 2018 (1978). The Plaintiff presented no evidence that Attorney General Morales knew or should have known of any misconduct on the part of his subordinates--especially since the Court

has seen no evidence of any misconduct on the part of the state's attorneys.

2. The Claims Against the Receiver, James Miller.

Defendant, James Miller, was appointed as the receiver for the water system after Mr. Nichols was removed by state court order. The evidence established that Defendant Miller took over an aging water system that barely serviced the nine families still on the system. Miller labored on the weekends to keep the system in working order. He did not increase the monthly payment for the service to the eight families and did not personally profit from his tenure as receiver beyond guaranteeing his own family the system as a source for water. He managed to keep the system in sufficient working order until the City of Lubbock was willing and able to provide a water source to the eight families. The Court finds that the Defendants, in any combination, did not conspire to deprive

the Plaintiff of his rights concerning the water system until the City of Lubbock made water available. To the contrary, the Court commends Defendant Miller for his selfless efforts to ensure a supply of water to the handful of customers who were dependent on the water system.

Defendant Miller argues that he enjoys a quasi-judicial immunity since he was acting as the receiver. The Court disagrees and holds that Defendant Miller is not entitled to judicial immunity. Defendant Miller next argues that as the receiver he is entitled to qualified immunity under Harlow, supra. The Court agrees. The Plaintiff is entitled to qualified immunity for all actions he took as the receiver. To the extent that the Plaintiff complains that there was a discrepancy in the inventory that Defendant Miller executed on February 1, 1988, concerning the outstanding debts of the water system; the Court finds that these complaints should have been raised

in the state court in the receivership suit. The Court makes an additional finding that the statute of limitations has run on any claim against Defendant Miller.

The Court finds that the claims against this Defendant is barred by the state of limitations. Assuming that the Plaintiff has a claim against this Defendant under 42 U.S.C. § 1983, that cause of action accrued on May 5, 1988--the date that the Order discharging the receiver became final and unappealable. The statute of limitations applicable to a § 1983 claim is the two year statute of limitations for personal injury actions. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986); Wilson v. Garcia, 195 S.Ct. 193 (1985).

3. The Claims Against John Hall.

Defendant, John Hall holds a supervisory position with the Texas Water Commission. The Plaintiff presented no evidence of any kind against Defendant

Hall. The Court heard no evidence that would support any finding of liability against Defendant Hall. Accordingly, the Court finds for Defendant Hall on all of Plaintiff's claims.

4. The State of Texas, the Texas Water Commission, and the PUC.

The Court finds that the Plaintiff has failed to prove that these Defendants violated the Plaintiff's rights under the Fifth or Fourteenth Amendments of the U.S. Constitution. The court holds that the claims against these defendants for damages are barred by the Eleventh Amendment of the United States Constitution. Pennhurst v. State School v. Halderman, 465 U.S. 79 (1984). These parties have not waived their right to immunity under the Eleventh Amendment.

The Court finds that the claims against these Defendants are barred by the statute of limitations. Assuming that the Plaintiff has a claim against any of the Defendants under 42 U.S.C. § 1983, that

cause of action accrued on May 5, 1988--the date that the Order discharging the receiver became final and unappealable. The statute of limitations applicable to a § 1983 claim is the two year statute of limitations for personal injury actions. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986); Wilson v. Garcia, 195 S.Ct. 193 (1985).

The Court finds that the claims against these Defendants are barred by the doctrine of res judicata. The Court holds that, as a matter of law, between identical parties, a final judgment of a state court of competent jurisdiction on the merits of a claim will bar the party from bringing the same claim in federal court as well as any other cause of action that could have been raised and resolved in the state court. Allen v. McCurry, 101 S.Ct. 411 (1980); and Lubrizol Corp. v. Exxon Corp., 871 F.2d 1297, 1287 (5th Cir. 1989). Plaintiff could have intervened in the receivership action, but he failed to

do so. He could have raised these claims in his state court law suit but failed to do so. The Court holds that the Plaintiff is precluded from pursuing these claims by the doctrine of res judicata.

The Court finds that the Plaintiff failed to prove that these Defendants acted intentionally to deprive Plaintiff of his constitutional rights. To the contrary, the Court finds that the Plaintiff intentionally chose to forfeit his rights to compensation by deciding not to intervene in the receivership suit.

The water system in question is not typical private property, rather it is a utility within the statutory definition and therefore is governed as is any operating utility, by the Public Utilities Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. art. 1446(c) § 2 (Vernon 1992). This statute was in effect at the time of the receivership proceedings. Under this statute, the PUC had the express authority to impose a receivership on this utility,

and could do so without compensation from the state. Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2900 (1992). The Plaintiff has no legal right in this Court to force these Defendants to compensate him for the use or deterioration of the water supply system.

5. Plaintiff's Failure to Prove Damages.

The Court also makes the following determination concerning Plaintiff's claim to damages. The Court specifically rejects the Plaintiff's testimony that the water system was worth $50,000 at the time the Receiver took it over. The Court accepts as true and sworn testimony that only nine families, paying $15 per month, remained paying customers at the time of the receivership. The Court finds that the plaintiff would not have made a profit during the period of time that the water system was run by the receiver. To the contrary, the evidence is that he would have lost money. There was credible testimony that the water from the Carlisle

water supply has been contaminated by the actions of an Air Force base and is now without value. The Court finds that there was nothing illegal or improper about the City of Lubbock making water available to the customers who had previously used Plaintiff's water system. Once these customers had access to a better water system, there was nothing improper about them changing to the new system. The Plaintiff has attempted to frame this as a "taking." The Court finds that no taking occurred. To the contrary, the Plaintiff's water system was operated by a receiver pursuant to a legitimate court order until a better and more reliable source became available. The Court finds that the Plaintiff failed to prove that he has incurred any compensable damages.

The Court holds that the plaintiff has failed to prove any of his claims against any of the Defendants and that he has failed to prove that he has suffered any compensable damages. The Court holds

that the Plaintiff shall take nothing, and that the Defendants shall have judgment for their costs.

SIGNED this the 17th day of September, 1993.

ALAN D. ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

NO. 93-8729

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

M. F. GUETERSLOH, JR.,
Plaintiff-Appellant

V.

STATE OF TEXAS, ET AL,
Defendant-Appellee

Appeal from the United States
District Court for the Western
District of Texas

Before GARWOOD, JOLLY and SMITH, Circuit Judges**

PER CURIAM:

This is an inverse condemnation suit for money damages only brought by Plaintiff-Appellant, M. F. Guetersloh, Jr., (Guetersloh) in the court below against the State of Texas and certain of its agencies and officers in their

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**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

official capacities under 42 U.S.C. § 1983 and the takings clause of the Fifth Amendment, as extended to the states by the Fourteenth Amendment.[1] Guetersloh claimed a temporary taking during and by virtue of a receivership, which had terminated prior to the judgment below, of a water company on the assets of which he had a lien which he had foreclosed before the receivership ended. Although defendants raised the Eleventh Amendment as a jurisdictional bar to this federal court suit, and the court below found that the suit was barred by the Eleventh Amendment, it nevertheless reached the merits and found Guetersloh's claims barred by limitations and res judicata,

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[1]To the extent that Guetersloh may have sought damages from any of the state officers in their individual capacities, he does not complain on appeal of the dismissal on the merits of any such claims; nor do we perceive any error in any such dismissal, as it is plain, inter alia, that any such claim would be defeated by qualified immunity.

that there was no compensable taking, and that no damages were proved; and accordingly it dismissed the suit.

It is settled that the Eleventh Amendment is a jurisdictional bar to a suit for damages in federal court against a state or any state agency or state officer in his official capacity, and that any abrogation or waiver of such bar must be express and unequivocal. Quern v. Jordan, 99 S.Ct. 1139, 1146 (1979); Penhurst State Sch. & Hosp. v. Halderman, 104 S.Ct. 900, 907-8 (1984); Ford Motor Co. vs. Department of Treasury, 65 S.Ct. 347, 350 (1945). Waiver of sovereign immunity in state courts does not waive Eleventh Amendment immunity from suit in federal court. Penhurst at 907 n.9. Under the circumstances, it is clear that the instant suit should have ben dismissed for want of jurisdiction under the Eleventh Amendment. See Barry v. Fordice, 814 F.Supp. 511 (S.D. Miss. 1992), aff'd on the basis of the district court

opinion, 8 F.3d 1 (5th Cir. 1993); John G. & Marie Stella Kenedy Mem. Found. v. Mauro, No. 92-7714, slip op. 4415 (5th Cir. May 27, 1994); Harrison v. Hickel, 6 F.3d 1347 (9th Cir. 1993). We note in this connection that, as the State of Texas through its Attorney General confirms and as Guetersloh admits, the courts of the State of Texas are open to inverse condemnation damage claims against state agencies on the basis of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, as well as on the basis of the Texas Constitution and laws. See, e.g., Estate of Scott v. Victoria County, 778 S.W.2d 585, 589-91 (Tex. App.-Corpus Christi 1989; n.w.h.) (Benavides, J.). In short, application of the Eleventh Amendment does not of itself deny a judicial forum, with ultimate review available in the United States Supreme Court, for resolution of Guetersloh's Fifth Amendment takings claim. Cf. Harrison at 1352-54.

We accordingly modify the judgment below so that the dismissal of Guetersloh's claims against the State of Texas, the state agencies, and the state officers in their official capacities is for want of jurisdiction under the Eleventh Amendment; and, as so modified, the judgment is affirmed.

MODIFIED and AFFIRMED AS MODIFIED

NO. 80-550

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERNEST WILSON, Plaintiff-Appellant

V.

STATE OF TENNESSEE, Defendant-Appellee

Appeal from the United States District Court for the Middle District of Tennessee

Before LIVELY and MERRITT, Circuit Judges, and PHILLIPS, Senior Circuit Judge

ORDER:

This appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. After examination of the briefs and record, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Plaintiff filed this civil complaint against the State of Tennessee seeking damages and injunctive relief. The complaint alleged that Plaintiff had been deprived of a tract of real property without due process and that state officials had acted improperly on several

occasions. The District Court granted the state's motion to dismiss due to sovereign immunity. Plaintiff filed a timely notice of appeal and now seeks to challenge this ruling.

Upon consideration, we affirm the district court's order. The Eleventh Amendment bars suits against a state that seek to impose a liability which must be paid from public funds, Edelman v. Jordan, 415 U.S. 651 (1974), except that the Eleventh Amendment does not bar an action for deprivation of property without just compensation under the Fifth Amendment as applied to the states through the Fourteenth Amendment. Since Tennessee has not consented to a waiver of immunity, 4 T.C.A. § 20-13-102, the demand for damages for other than the Fifth Amendment violation was properly dismissed. To the extent the complaint may be construed as one for a taking without just compensation or for equitable relief, we conclude that

it is insufficient and fails to state facts upon which relief may be granted.

The judgment of the district court is affirmed. Rule 9(d)3, Rules of the Sixth Circuit.

94-893

Supreme Court, U.S.
FILED
NOV 29 1994
OFFICE OF THE CLERK

NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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M.F. GUETERSLOH, JR.,
Petitioner

v.

THE STATE OF TEXAS, et al.,
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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QUESTION PRESENTED FOR REVIEW

Is the Eleventh Amendment a procedural bar to a takings claim under the Fifth and Fourteenth Amendment to the U.S. Constitution, in an inverse condemnation suit against a State and its officials?

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NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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M.F. GUETERSLOH, JR.,
Petitioner

v.

THE STATE OF TEXAS, et al.,
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

CONSTITUTIONAL PROVISIONS INVOLVED

The following constitutional provisions are at issue: U.S. Const. Amend. V, XI, and XIV.

STATEMENT OF THE CASE

In 1982, Petitioner owned a lienholder's interest in a small, privately owned water system in the rural Carlisle community near Lubbock, Texas, having sold the system to an individual named Ray Nichols. Petitioner retained a vendor's lien and deed of trust as security. The system was in a dilapidated condition at the time of the sale to Nichols.

Nichols managed the utility in violation of state statutory standards and after reviewing complaints from customers, the Public Utility Commission (PUC)[1] investigated, held hearings, and on October 22, 1982, ordered Nichols to remedy a number of serious technical and managerial deficiencies.

When the violations continued, PUC filed suit in state district court in Travis County to declare statutory receivership[2]. In July, 1983, a Travis County court named James Miller receiver and directed him to take possession of and operate the utility to prevent interruption of service and to maintain compliance with the Health Department and PUC standards.

In late 1985, Petitioner privately foreclosed his lien, claimed legal title to the system and attempted to re-enter and take possession of the utility. Unable to oust the receiver, he physically removed one of the pumps and shut down the water supply. When that tactic didn't succeed, he attempted to evict the receiver by filing a forcible entry and detainer action in JP court, but the receiver sought and received an order from the district court in Austin enjoining further interference with his management.

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[1] In 1985, authority to regulate water and sewer systems was transferred from the PUC to the Texas Water Commission under the Texas Water Code. See historical note Tex. Water Code Ann. § 13.001 et seq. (Vernon 1988) at 271.

[2] The Public Utilities Regulatory Act, Tex.Rev. Civ.Stat.Ann., art. 1446c (Vernon 1980), as originally enacted in 1975, contained no provision for receivership; that was added as Art. 1446C §§ 71A and 71B, effective April 7, 1981 (Vernon Supp. 1993, at 109). On receivership practice generally see Tex.R.Civ.P. 695, Tex. Civ.Prac.Rem. Code §64.001 *et seq.* Dorsaneo, *Texas Litigation Guide*, Chapter 43 (Matthew Bender, 1992).

From time to time during the pendancy of the receivership, attorneys representing the state notified Petitioner of developments in the proceedings and suggested that he intervene as he had a right to do under the applicable statutes,[3] but he failed to do so. Instead, Petitioner filed an inverse condemnation lawsuit in a district court in Lubbock County, naming as defendants the receiver, James Miller, and the City of Lubbock.

In that action Petitioner originally alleged that the receivership constituted a "taking, damaging, or destroying ... for, or application to, public use without adequate compensation" in violation of the Texas Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Subsequently, Petitioner abandoned his federal constitutional takings claims, and elected to proceed solely on the basis of his state constitutional claims.

The Public Utilities Commission intervened in the inverse condemnation action and took over the defense. In March, 1986, PUC lawyers caused the receivership case to be transferred from Travis County to Lubbock. At this point, both cases were in Lubbock County, but in different district courts.

The receiver continued to manage the utility until April, 1988, on which date administration was terminated and the receiver's final accounting approved without objection. Petitioner still had not intervened.

By the time of the termination of the receivership, the City of Lubbock had completed extension of its lines into the Carlisle community, and all of the former customers of Petitioner's private utility were hooked up to the municipal water system. Next, the PUC and City of Lubbock filed motions for summary judgment in the inverse condemnation suit. Petitioner offered no proof in the summary judgment proceeding, not even evidence of his legal title, and the district court granted summary

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[3] See footnote 2.

judgment to all movants except the PUC. The Lubbock court transferred the case back to Travis County, and the district court there granted summary judgment to the PUC.

Petitioner appealed to the Austin Court of Appeals, and it affirmed. The Texas Supreme Court denied writ of error.

On June 10, 1992, Petitioner filed his First Original Complaint in the United States District Court for the Western District of Texas, Austin Division. Petitioner brought an action for inverse condemnation alleging that Respondents, the State of Texas, the Public Utilities Commission (PUC), the Texas Water Commission, Attorney General Dan Morales, the directors and employees of these agencies in their individual and official capacities and James Miller, had taken Petitioner's property in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and of 42 U.S.C. § 1983. Petitioner sought compensatory and punitive damages, pre- and post-judgment interest and attorney's fees.

On September 15, 1993, the parties appeared before United States Magistrate Alan Albright for a non-jury trial on the merits. Petitioner asserted two claims in the trial court: the first an action against the State of Texas[4] for "just compensation" for the taking of property and, the second, a 42 U.S.C. § 1983 civil rights claim against the individual estates of several officials, lawyers, and the receiver, James Miller.

The trial court entered a final order on September 17, 1992 denying relief on all claims. Petitioner seeks writ concerning only his takings claims against the state, and has abandoned the civil rights claims against all of the individuals. The only issue raised by this petition for writ relates to the claim for just compensation against the State of Texas.

[4] The incarnations in which the state is sued are as Public Utilities Commission, Texas Water Commission, Attorney General Dan Morales, and the directors and employees of these agencies in their official capacities.

The trial court held that the claim was barred by the Eleventh Amendment, the statute of limitations, and *res judicata*. The trial court also held that there was no compensable taking and that Petitioner had failed to prove any monetary loss as a result of the claimed taking. On June 3, 1994, the Fifth Circuit modified and affirmed the trial court judgment, holding that the dismissal of Petitioner's claims was proper for want of jurisdiction under the Eleventh Amendment.

REASONS FOR DENYING THE WRIT

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE NO LEGITIMATE CONFLICT EXISTS AS TO WHETHER THE ELEVENTH AMENDMENT ACTS AS A JURISDICTIONAL BAR TO A SUIT FOR DAMAGES AGAINST A STATE IN FEDERAL COURT.

The Fifth Circuit properly concluded that the Eleventh Amendment is a jurisdictional bar to a suit for damages in federal court against a state, any state agency, or state officer in his official capacity, and that any abrogation or waiver of such a bar must be express and unequivocal. The Circuit's decision was based upon well-established Eleventh Amendment principles embraced and adopted by this Court. *Quern v. Jordan*, 440 U.S. 332, 343, 99 S.Ct. 1139, 1146 (1979); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98-100, 104 S.Ct. 900, 907-8 (1984); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462, 65 S.Ct. 347, 350 (1945).

Petitioner's Fifth Amendment just compensation action in federal court against the State of Texas is, consequently, barred for lack of jurisdiction. *John G. and Stella Marie Kenedy Mem. Foundation v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994); *Harrison v. Hickel*, 6 F.3d 1347, 1352 (9th Cir. 1993).

Petitioner's assertion that the circuits are in conflict is misplaced. Petitioner's sole reliance on an unpublished Sixth Circuit opinion does not present before this Court a legitimate conflict of binding circuit law. Unpublished opinions are not written to pronounce the law of the jurisdiction. They are written merely to inform the parties of the reasons for the court's decision, not to serve as guidance for future judicial decisionmaking. They do not contain extensive and elaborate reasoning or narrowly tailored holdings, and precise language is notably absent from them. *People of the Territory of Guam v. Yang*, 800 F.2d 945, 949 (9th Cir. 1986). They have, by definition, no controlling precedential authority, and cannot serve as the sole basis for a challenge of binding circuit law. *See e.g.* FED. R. APP. P. 47; 5TH CIR. R. 47.5.1, 47.5.3.

Consequently, federal jurisprudence would be better served by letting this issue percolate further in the circuits.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER'S FIFTH AMENDMENT JUST COMPENSATION CLAIM IS NOT RIPE.

Petitioner's Fifth Amendment Just Compensation claim is not properly before this Court. Petitioner has failed to exhaust the available and adequate state remedies afforded to him by the State of Texas. This Court has determined that this failure to exhaust state remedies is an unwaivable prerequisite to a Fifth Amendment suit.

> If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. *Williamson County Regional Planning v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121 (1985).

A property owner, as a matter of law, cannot suffer a violation of the Just Compensation Clause until the owner has been denied just compensation through the procedures provided by the state for obtaining such compensation. *Id.* The Fifth Amendment does not proscribe the taking of property; it only proscribes taking without just compensation. *Id.* at 194, 105 S.Ct. at 3120.

Petitioner's claim does not present to this Court an opportunity to decide whether a property owner, having exhausted all state remedies and been denied just compensation, can bring a Fifth Amendment cause of action against a state in federal court. This case contains complicated facts that render a writ improper at this time. Petitioner has not used the procedures the State of Texas has implemented to remedy government takings without just compensation. Petitioner failed to intervene in the receivership proceeding, stating that in his subjective belief he would not be successful. This remedy, which Petitioner has made no attempt to characterize as inadequate to protect his federal constitutional rights, is only one example of Petitioner's lack of diligence in seeking relief under state remedial procedures.

Petitioner subsequently filed suit in state court, first asserting, but later abandoning, his Fifth Amendment Just Compensation action. Petitioner ultimately proceeded solely under the Texas Constitution's takings clause. Petitioner, having elected not to argue his Fifth Amendment claim in state court, and having lost his takings case under the Texas Constitution, now asserts that the state remedy is inadequate in actual practice to provide him with just compensation under the Fifth Amendment.

Petitioner seems to equate success of his claim in the state courts with an adequate and available state remedy. If this were the case, every plaintiff who was dissatisfied with the results of his state takings lawsuit could demand relief from the federal courts. Neither lack of success in a state court, nor a claimed

inadequacy of an award rise to the level of a constitutional question.

The test for an available and adequate state procedure for seeking just compensation begins with the presumption that the state procedure implemented is fair. A plaintiff then carries the burden of establishing that the state law unquestionably would afford him no remedy. *See Samaad v. City of Dallas*, 940 F.2d 925, 935 (5th Cir. 1991). Petitioner's assertion that Texas law affords him no remedy, based solely on the Texas courts' findings that he was entitled to no compensation, is incorrect. Comparison of state and federal law reveals that Texas law is as liberal, if not more so, as federal law in compensating property owners subjected to regulatory takings under the police power. *Id.* at 936.

Under federal law, regulatory takings that involve physical invasion of property entitle the owner to compensation even if the taking is only partial or temporary. *Lucas v. South Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886, 2892 (1992); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318, 107 S.Ct. 2378, 2388 (1987). On the other hand, where the government does not physically occupy the property but only restricts its use -- for example, by zoning ordinance -- federal law requires compensation only if the effect is a total denial of all economically beneficial uses of the property. *Lucas*, 112 S.Ct at 2895; *First English*, 482 U.S. at 320, 107 S.Ct at 2388. Land use regulations which merely diminish the value are not takings under federal law and are not required to be compensated. Federal law does nor require compensation for mere damage to property as does Texas law. *Id.*

An analysis of Texas eminent domain law begins with Article I, Section 17 of the Texas Constitution.

> "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation."

The Texas Supreme Court has interpreted this language to create a cause of action under state law for the recovery of the economic value of property resulting from valid scenic zoning regulations enacted under the police power, whether the losses are permanent or temporary. *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978). The Texas Constitution, therefore, compensates for regulatory takings at least as liberally as does the federal. In addition, state law apparently goes further than federal law and provides a remedy for mere damage to property resulting from lawful exercise of police power whether or not it amounts to a taking. *Steele v. City of Houston*, 603 S.W.2d 786, 789 (Tex. 1980).

It is clear that since Texas has fashioned remedies that meet or surpass federal standards[5], these remedies are far from being "unavailable" or "inadequate." Petitioner's assertion that the decision of the Texas state courts granting summary judgment against him in his state takings action, constitutes evidence of an inadequate and unavailable remedy, is erroneous and presents no substantive question for this Court's determination.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER HAS AN ALTERNATIVE FORUM FOR ADJUDICATING HIS FIFTH AMENDMENT JUST COMPENSATION CLAIM.

The Fifth Circuit correctly concluded that Petitioner is not without recourse as to his Fifth Amendment Just Compensation claim. The Texas courts are open to Fifth Amendment inverse condemnation suits for damages against the state. This

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[5] *See Williamson County*, 473 U.S. at 196, 105 S.Ct. at 3122; *Samaad*, 940 F.2d at 934-35.

availability is not disputed by Petitioner, and is further evidenced by his filing such an action in state court. Petitioner, nonetheless, claims that he should have the additional right to a trial in federal court, and argues that applying the Eleventh Amendment to bar Fifth Amendment Takings claims against a state in federal court will have "the effect of rendering the takings clause of the Fifth Amendment meaningless as applied to the states." This statement is inaccurate. A property owner who has suffered a taking by a state has a forum available in which he may have his Fifth Amendment rights adjudicated. Plaintiff asserts that this remedy is inadequate given his unsuccessful state court suit in which the appellate court ruled that compensation was not required for the loss Petitioner sustained. The question of whether compensation is required is a question of fact that, in this case, has been decided under the Texas Constitution. This determination was also available to Petitioner under the U.S. Constitution had he chosen to litigate that issue. Petitioner's assertion concerning the adequacy of the state remedy at this time, however, is inappropriate.

Petitioner refers at length to *First English*, to support his contention that he has a right to a federal cause of action for his Fifth Amendment takings claim. This is not the case. In *First English*, the Plaintiff brought its Fifth Amendment claim *in state court against a defendant that was not a state*. It is not disputed that a property owner can maintain this type of suit against a municipality or county. *See Mt. Healthy Board of Education v. Doyle*, 429 U.S. 274, 280-81, 97 S.Ct. 568, 572-73 (1977); *Monell v. Department of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035 (1978). This rule of law, however, does not support Petitioner's contention that such a suit can be maintained in federal court against a state.

Further, *First English* actually supports the principle that the litigation of Fifth Amendment claims in *state* court is sufficient to afford a person his rights under the Fifth Amendment. Petitioner could have brought his Fifth Amendment claim in state court just as the plaintiffs in *First English* did, but elected not to. Texas courts have been, and continue to be, open to

inverse condemnation damage claims on the basis of the Fifth Amendment. *State v. Biggar*, 873 S.W.2d 11, 13 (Tex.1994); *Estate of Scott v. Victoria County*, 778 S.W.2d 585, 589-91 (Tex.App. -- Corpus Christi 1989, n.w.h.); *Grand Prarie v. Sisters of Holy Family*, 868 S.W. 2d 835, 844 (Tex.App. -- Dallas 1993, n.w.h.). Thus the Fifth Circuit's holding, contrary to Petitioner's assertion, has not rendered the Fifth Amendment meaningless. Petitioner's writ should, therefore, be denied.

CONCLUSION

Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

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FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-393

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

M. F. GUETERSLOH, JR.,

Petitioner

V.

THE STATE OF TEXAS; THE PUBLIC UTILITY COMMISSION; PAUL MEEK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION; THE TEXAS WATER COMMISSION; JOHN HALL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE TEXAS WATER COMMISSION; DAN MORALES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF TEXAS; NORMA K. SCOGIN AND KAREN PETTIGREW, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS ASSISTANT ATTORNEYS GENERAL OF TEXAS; AND JAMES MILLER,

Respondents

REPLY TO RESPONDENTS' BRIEF WHICH WAS FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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M. F. GUETERSLOH, JR.,

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v.

THE STATE OF TEXAS, et al.,

Respondents

REPLY TO RESPONDENTS' BRIEF WHICH WAS FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

M. F. GUETERSLOH, the petitioner herein, submits his reply to Respondents' Brief Filed in Opposition to Petition for Writ of Certiorari. In order that this Court not be misled, Petitioner feels that some of Respondents' allegations necessitate a response. Respondents inaccurately state (Resp. Br., p. 4) that

the "only issue raised by this petition for writ relates to the claim for just compensation against the State of Texas." The only issue in this case is whether the Eleventh Amendment is a procedural bar to a takings claim under the Fifth Amendment. Petitioner's takings claim against the State of Texas was not addressed by the Fifth Circuit because that court ruled the Eleventh Amendment barred Petitioner's suit against the state.

REPLY TO RESPONDENTS' FACT RECITATIONS

Respondents' recitations of the facts are in error as follows:

1. Respondents are correct in stating that Petitioner had a lien on a privately-owned water system when Respondents placed the system in receivership. Petitioner had sold the water system and had retained a lien on the property. Respondents make the totally false statement that the system

was in a dilapidated condition when it was sold. There is no evidence in the record nor has there ever been an issue in this case as to the state of the water system when it was sold.

2. Respondents failed to point out that, after the water system was placed in receivership, the receiver operated the system for five years, from 1983 to 1988, but paid nothing on Petitioner's note.

After Petitioner foreclosed on the water system but was enjoined by Respondent from possession of the property, Petitioner filed suit in Lubbock County against the receiver, James Miller, and the City of Lubbock. Petitioner alleged in his first original petition that the defendants' acts constituted "a taking" of his property for a public use without compensation, in violation of Section 17 of Article I of the Texas Constitution and in violation of the Fifth

and Fourteenth Amendments to the United States Constitution." Respondents did intervene in that proceeding, but a month prior to filing its Plea in Intervention, a district court in Travis County, Texas, entered a temporary injunction against Petitioner and his attorney, preventing both of them access to the water system "and from interfering with receiver's right of possession." Respondents sought the injunction because Petitioner had foreclosed on the property under his lien. Respondents then sought to prevent Petitioner access to his property even though there had never been any complaints filed against Petitioner when Petitioner had operated the water system. Respondents contend that attorneys representing the state notified Petitioner and suggested that he intervene in the receivership and that his failure to do so precludes him from filing an inverse

condemnation suit against the state. Respondents obtained an injunction against Petitioner preventing him from interfering in any manner with the receivership. Consequently, Petitioner would hardly pursue intervention as a means of reacquiring his property.

Petitioner then filed an amended complaint in his inverse condemnation suit and joined the Texas Public Utility Commission and the Texas Water Commission as defendants. In his amended complaint, he alleged a taking only under Section 17 of Article I of the Texas Constitution. Petitioner abandoned his takings claim under the Fifth and Fourteenth Amendments because this Court held, in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985), that just compensation claims under the Fifth and Fourteenth Amendments of the United States Constitution are not ripe

for review until a property owner has unsuccessfully sought compensation from the state.

3. The water system remained in receivership until 1988 when the City of Lubbock successfully completed a water system for the Carlisle area. The City, in fact, requested Respondent, the Texas Water Commission (which preceded the Texas Public Utility Commission), to continue the receivership of Petitioner's water supply until it could complete its water system to service the residents of the Carlisle addition. All the former customers of Petitioner had become customers of the City. Thus, when Respondents returned the water system to Petitioner, the system was worthless.

4. Respondents are in error in stating Petitioner offered no proof in the summary judgment proceeding. Petitioner clearly claimed title to the property. He

had not claimed title to the property prior to the foreclosure because, prior to his foreclosure, he was only a lienholder. It is obvious that Petitioner presented proof at the hearing because the district court did not grant the PUC's motion for summary judgment. The district court in Lubbock County denied the PUC's motion and then transferred the case to Travis County.

The State of Texas, the PUC and the Texas Water Commission filed a motion for summary judgment and a plea to the jurisdiction in the district court in Travis County, contending that the district court did not have jurisdiction because the suit was allegedly barred by the doctrine of sovereign immunity. The State of Texas filed a plea to the court's jurisdiction, contending the suit was barred by the doctrine of sovereign immunity even though the Supreme Court of

Texas had ruled, in Steele v. City of Houston, 603 S.W.2d 786, 791 (Tex. 1980) that the Texas Constitution authorizes compensation for the destruction of property and that the authorization is a waiver of governmental immunity. Petitioner filed an answer to the state's motion for summary judgment and plea to the jurisdiction and represented himself pro se at the hearing in the district court in Travis County on Respondents' motions. The court granted the summary judgment.

The Court of Appeals affirmed, ruling that the state's taking of Petitioner's property was a valid exercise of the state's police power, an issue that was not raised in the district court. The Court of Appeal ruled that a state agency may take an individual's property without paying the individual just compensation so long as the taking represents any form of

exercise of the state's police power. The Court of Appeals did not condition its ruling upon a requirement that the trial court make findings as to the extent of, or the circumstances surrounding, the taking. The Court of Appeals also ruled that the state proved as a matter of law that its taking of Petitioner's property was a valid exercise of its police power, even though the state contended, for the first time on appeal, that its taking was a valid exercise of its police power. This was not an issue in the trial court.

The Court of Appeals stated on page 7 of its opinion: "As a matter of law the summary judgment evidence negated any action for inverse condemnation because the Commission's authority to seek a receivership against this utility was a valid exercise of the state's police power, rather than a 'taking.'" Although the Court of Appeals recognized that the

district court entered a summary judgment for the PUC and the State of Texas, it determined that "evidence" in the summary judgment hearing negated any action for inverse condemnation.

Petitioner filed a writ of error to the Texas Supreme Court, which was denied.

Having exhausted all state remedies, Petitioner filed a takings claim under the Fifth and Fourteenth Amendments to the U. S. Constitution in the U. S. District Court for the Western District of Texas, Austin Division. The District Court's ruling that Petitioner's claim is barred by the Eleventh Amendment was affirmed by the Fifth Circuit Court of Appeals.

REPLY TO RESPONDENTS' CONCLUSIONS OF LAW

Respondents requested that the Court of Appeals for the Fifth Circuit publish its opinion in this case, because its opinion "addressed concerns and discussed legal issues of significant public

interest." Respondents now contend that this Court should deny certiorari because "federal jurisprudence would be better served by letting this issue percolate further in the circuits." (Resp. Br., p. 6) If this Court does not reverse the ruling of the Fifth Circuit that the Eleventh Amendment is a procedural bar to a takings claim against the state, it would be the State of Texas, rather than "federal jurisprudence," that would be better served. The State of Texas could continue to ignore the just compensation mandate of the Fifth and Fourteenth Amendments.

Respondents state that Petitioner has an adequate remedy in the Texas state courts even though Petitioner was never permitted to present his claim in the state courts. Respondents contend that "success" in a state takings claim is not equated with "an adequate and available

state remedy." Petitioner's lack of success does equate, however, with his failure to receive just compensation from the state.

Respondents also contend that Petitioner should have intervened in the receivership proceeding and his "lack of diligence in seeking relief under state remedial procedures" (Resp. Br., p. 7) indicates he has not exhausted "the available and adequate state remedies afforded to him by the State of Texas." Respondents do not present any authority for their novel position, that there is a procedural prerequisite to a property owner's filing of an inverse condemnation suit. It is axiomatic that when a state takes private property for a public use and does not pay the property owner just compensation, the property owner's recourse is an inverse condemnation suit. [See Brazos River Authority v. City of

Graham, 354 S.W.2d 99, 104 (Tex. 1961).] Typical of the state's continuing hostility toward the constitutional mandate, Respondents are attempting to erect a procedural prerequisite to Petitioner's right even to file initially an inverse condemnation suit. In Lucas v. So. Carolina Coastal Council, 112 S.Ct. 2886, 2891 (1993), the Supreme Court ruled that the petitioner in that case, Lucas, was not required to pursue a "special permit" procedure available to him before his takings claim was considered ripe. Petitioner in this case was not required to perform a useless act by intervening in a receivership which had already conclusively denied him access to his property.

This Court ruled in Williamson County Regional Planning Commission, 473 U.S. at 194, that a Fifth Amendment claim is premature until the state finally and

ultimately refuses to pay a property owner. Contrary to Respondents' statement that "neither success nor a claimed inadequacy of an award rise to the level of a constitutional question," it is precisely the lack of success or the claimed inadequacy of an award (in this case the award being zero) that gives rise to a Fifth Amendment takings claim.

Respondents present a novel test which they contend applies to a takings claim under the Fifth Amendment. According to Respondents (Resp. Br., p. 8):

> The test for an available and adequate state procedure for seeking just compensation begins with the presumption the state procedure implemented is fair. A plaintiff then carries the burden of establishing that the state law unquestionably would afford him no remedy.

The Fifth Amendment has no such test. The Fifth Amendment provides in simple terms that private property may not be taken "for public use, without just

compensation." The Fourteenth Amendment states unequivocally that a state may not deprive any person of "life, liberty, or property, without due process of law." A property owner has no burden to establish that "the state law unquestionably would afford him no remedy." The test for whether a property owner has a Fifth and Fourteenth Amendments takings claim is whether a state took the owner's property for a public use and refused to pay the owner just compensation. There are no other prerequisites. The State, through its attorneys and through its court system, has, in effect, itself demonstrated that the property owner has no remedy in the state. Respondents contend that the Texas Constitution compensates for regulatory takings as liberally as does the federal constitution. Whether or not this is the case, the State did not follow the Texas

constitutional requirement that Petitioner be paid for the state's taking of his property. The Texas courts may be open to takings claims, but they denied Petitioner even the right to present his claim by granting the state's motion for summary judgment. When Petitioner pursued his claim further by filing an appeal to the state court of appeals and then to the state supreme court, Petitioner exhausted his state remedies. His Fifth Amendment takings claim is now ripe. The Fifth Circuit should not be permitted to institute a procedural roadblock by granting the states immunity from such suits.

Respondents state (Resp. Br., p. 10) that the "question of whether compensation is required is a question of fact that, in this case, has been decided under the Texas Constitution." (Emphasis added.) This is an interesting conclusion given

the fact that the state district court granted the state summary judgment.

In Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893), this Court declared that the takings clause "reaches back" of all "unalienable rights" set out in the first ten amendments to the Constitution. This Court recognized in Monogahela that the first ten amendments

> are in the nature of a bill of rights and were adopted in order to quiet the apprehension of many that without some declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights. (Id. at 324)

This Court asserted that this "natural equity" was incident to the government's exercise of its power of eminent domain. According to this Court in Monogahela, "the one is so inseparably connected with the other that they may be said to exist,

not as separate and distinct principles, but as parts of one and the same principle." (Id. at 325) It is inconceivable how rights guaranteed to U. S. citizens through the bill of rights set out in the first ten amendments to the Constitution can be taken away by a procedural bar enacted in the form of a later, Eleventh Amendment.

In Dolan v. City of Tigard, 129 L.Ed.2d 304 (1994), this Court recognized the status of the Fifth Amendment as a part of the Bill of Rights. This Court stated in Dolan:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation...

If the ruling of the Court of Appeals for the Fifth Circuit is not reversed, the

Fifth Amendment will be relegated to the status of a poor relation because any Fifth Amendment claim against a state will be procedurally barred.

CONCLUSION

The issue in this case is not whether Texas courts are open to takings claims. The issue is whether the Eleventh Amendment can preclude a Fifth Amendment takings claim in a federal court.

A state should not be permitted to avoid the constitutional mandate of just compensation by a procedural bar.

This Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit and remand the case for consideration of whether the State of Texas did, in fact, take

Petitioner's property without just compensation.

Respectfully submitted,

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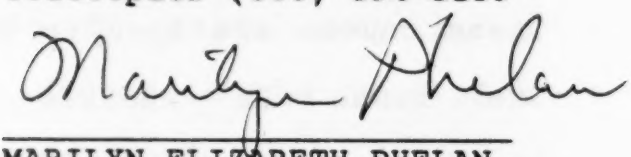

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